United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

76-1328

To be argued by
JOHN M. ARMENTANO

B P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

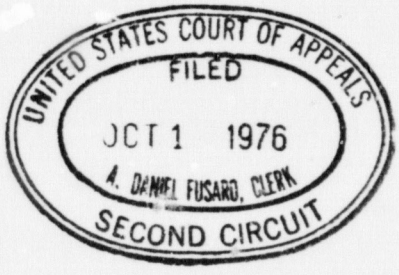
UNITED STATES OF AMERICA,
Appellee,

—against—

WILLIAM CAHN,
Defendant-Appellant.

On Appeal from the United States District Court for the Eastern District of New York

APPELLANT'S BRIEF



FARRELL, FRITZ, CAEMMERER & CLEARY, P.C.
Attorneys for Defendant-Appellant
374 Hillside Avenue
Williston Park, New York 11596
(516) 741-1111

JOHN M. ARMENTANO
Of Counsel

TABLE OF CONTENTS

TABLE OF CONTENTS (Cont.)

TABLE OF CASES

TABLE OF CASES (Cont.)

TABLE OF STATUTES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

UNITED STATES OF AMERICA,

Appellee,

-against-

WILLIAM CAHN,

Defendant-Appellant.

On Appeal From the United States District Court for the Eastern District of New York.

- X

APPELLANT'S BRIEF

PRELIMINARY STATEMENT

Defendant was indicted in 1975 pursuant to Indictment No. 645 on eight counts of mail fraud, one count of making a false statement, and two counts of perjury (11a-28a).* Prior to trial on this indictment, the perjury counts were severed, the false statement count was dismissed on motion, and the trial proceeded on the remaining counts- mail fraud. Because the jury was unable to reach a verdict, a mistrial was declared. Prior to

---

* Unless indicated, numbers in parentheses refer to pages in the Appendix.

the new trial, defendant was reindicted by means of a superseding indictment on 36 counts of mail fraud and 10 counts of making a false statement, including the one that had been dismissed (30a-41a). Also prior to trial, the defendant's motion to dismiss the superseding indictment on the ground, among others, that it violated his due process and double jeopardy rights, was denied. After trial before Judge Judd, he was convicted on the remaining 45 counts of the superseding indictment and was sentenced to a concurrent term of one year and one day imprisonment on counts 1 through 44, two years of unsupervised probation on count 46, as well as to a fine in the amount of $2,500.00 on all counts (1976).

FACTS DEVELOPED AT TRIAL NO. 2

William Cahn, the defendant, had been associated with the District Attorney's office of Nassau County for 25 years (728). Of those years he spent 12 years as the District Attorney (731). He operated his office on a "need to know" basis (1438) and enjoyed quite a reputation as a crime fighter, particularly against organized crime (732, 733). He also did much of the investigating of major matters himself and was more an investigative D.A. than an administrative D.A. (733). Briefly stated, Mr. Cahn was active on a national scale and even on an international scale in connection with crime fighting and in connection with education of District Attorneys for improved law enforcement in this nation (734-737).

He testified that one day while in his office, he received a telephone call from an unidentified person who offered to be an informer for him (75)). At this person's request, he met him at the Roosevelt Field Shopping Center in Nassau County (750). Cahn traveled to that meeting alone (751), but was kept under surveillance

by Chief Spahr, a Police liaison officer who held the rank of Assistant Chief Inspector in Nassau County (636-638). Spahr testified that he followed Cahn to the rendezvous and observed the following:

> "A. You [Mr. Cahn] parked your car, stood alongside it for a while. A few moments later you were approached by a man. You had a conversation with this individual for about, I would say, fifteen minutes or a half hour. He left. You drove away. I left my car which was parked a considerable distance from where you were, followed this man on foot. He entered the shopping center and that was the last I saw of him at that time.
>
> Q. Could you describe Sam Houston, please?
>
> A. Yes, sir. He was male, white, about fifty years old. He was 5-8 or 5-9, medium build, dark hair." (639).

At the first meeting with the informer, Mr. Cahn testified that the following took place:

> "He [the informer] told me [Cahn] he had a relative who was an informant for some law enforcement agency. He didn't tell me the relative and wouldn't tell me the law enforcement agency, but he said as a result of a leak his relative was killed. He was ma.. He thought there was negligence. He thought it might have been deliberate.
>
> He was coming to me to cooperate with me and he would give me information. He wasn't that much interested in money. He was more interested in the revenge. I told him that I wasn't going to buy a pig in a poke.

I asked him to give me information which would indicate to me some reliability on his part. He did. I just don't remember exactly what it was at that particular time.

He stipulated certain conditions. One, that I would never try to determine his true identity; two, that he would absolutely sign no receipt for any money given to him, and that he would tolerate --he didn't use the word tolerate, I am paraphrasing now--he did not want me to submit any vouchers or claims or anything else--and he was quite knowledgable in that particular area--to anybody which would in any way suggest a payment.

I told him: 'You are making it impossible for me to pay you.'

He said: 'That is your problem.'

And I said, 'Look, we don't put names of informants--' and there was some discussion about that and he told me what I could do with the claim whether his name was on it or not. 'If you want me, I'm willing to go,' he said, ' but these are my conditions.'

The conversation lasted about a half hour and I told him he would have to get in touch with me thereafter.

Another one of the conditions was he would no longer meet me in the metropolitan area. I don't know, I don't remember at this momemt, Mr. Bogin [the attorney examining Cahn on his direct case], whether he said the State of New York or not. However, he told me because of his position he had been in a position to meet me anywhere that I said almost at any given time. This was quite unusual. I had never heard of it before. And I said that he would have to let me know--Where can I get in touch with you, that question.

Q. Don't call me, I will call you?

A. That was it. And I left." (751-753).

In order to solve the problem of paying the informer (hereinafter referred to as Sam Houston, the code name employed) according to his terms, Mr. Cahn communicated with the then County Comptroller, Angelo D. Roncallo (756). Roncallo did not remember the coversation to the same extent as Cahn (612 et seq) who testified:

> "He [Roncallo] told me he knew of no way of paying an informant without submitting a county voucher. Then I suggested to him that if I traveled on behalf of the County and traveled on behalf of the National District Attorneys' Association and received my expenses from the National District Attorneys' Association and used the money to pay the informant without submitting a voucher, would he have or would he know of any legal prohibition or any kind of prohibition at all." (756-757).

Mr. Cahn then researched the legality of his approach and concluded tnat it was permissible (759-760).

Reduced to its barest outline, Mr. Cahn testified that he was entitled to reimbursement from various organizations for travel in connection with business of those organizations and that he also had at his disposal a "Prosecution Fund" which was basically a fund of Nassau County money which was available for immediate use, but which had to be reimbursed as expeditiously as possible. Accordingly, Mr. Cahn developed the following method of having Nassau County pay the informer without reflecting

it in actual claim forms to the County of Nassau:

1. Prior to embarking upon a trip for one of the organizations in which he was involved, he would draw expense money from the Nassau County Prosecution Fund because he was also going on the trip for County purposes--usually involving an extensive investigation of possible illegal activities at the Nassau County Jail, which involved extensive travel.
2. He would then go on the trip and perform both County business as well as business for the organization involved.
3. Upon return from the trip he would request in a letter, reimbursement for his expenses from the organization involved.
4. When this claim was paid to him, he repaid the County by cashing the check and placing the money in an envelope which he kept in his closet labeled "S.H." (761 et seq.).

It was and is the defendant's contention that, since Nassau County had the obligation to pay for informers for a District Attorney (87, 91), since he actually billed the organization for the trip and since the County had

already loaned money to Mr. Cahn for the trip out of the Prosecution Fund, the loan from the County was REPAID. This repayment was not done directly, by paying the monies into the Comptroller's office, but it was accomplished by creating a Sam Houston fund which was used exclusively for the payment of monies to Sam Houston, a County obligation. By this method of payment Mr. Cahn was able to keep his word and integrity to the informer, and he was able to get additional information from the informer at these various meetings. The total amounts paid to Sam Houston between January 1970 and November 1974 was $19,750. (765).

At the meetings with Sam Houston, Mr. Cahn had a witness who saw him pay Houston and heard him give Mr. Cahn the information. Defendant's Exhibit L (2070-2080) is a detailed account of meetings with Houston which Mr. Cahn kept. The entries begin on January 14, 1970 and run through November 10, 1974. In addition to the log, Mr. Cahn himself executed an affidavit every time he met Houston and every time a payment was made (2044-2069). Further, affidavits of the witnesses to the meetings--either Joseph Spinnato, an Assistant District Attorney, or Charles Spahr, an Assistant Chief Inspector of the Nassau County

Police Department--sworn to around the dates of the meetings were introduced (2011-2041).

Because the organizations for whose purposes (in addition to the County purposes) Mr. Cahn was traveling were funded in whole or in part by the Law Enforcement Assistance Administration (LEAA), he was indicted for filing false statements under 18 U.S.C. 1001. That is, the Government contended that, since Nassau County was already paying for the trip because of County business, Mr. Cahn's statement to the organization, funded in whole or in part by LEAA monies, violated 18 U.S.C. 1001 in that he stated on the claim form submitted to the organization that he was not receiving reimbursement from any other source and that no other funds were available to reimburse him (33 et seq). Count No. 2 of the indictment is also a false statement charge (31a-32a). Since the mails were being used for the purpose of transmitting various claims to the organizations, he was indicted for mail fraud (18 U.S.C. 1341).

In addition to the mail fraud and the false statement counts, the government included as count 46 , the last

count of the indictment, a charge that defendant obtained money by false pretenses by charging the NDAA $100 for hotel expenses that were provided for the defendant free of charge. This count is very crucial to the case, because the government did not include it in the original indictment, but it did include it in the superseding indictment and by virtue of its inclusion the government brought into evidence what it considered to be prior similar acts, which will be discussed below. With respect to this $100, Patrick Healy, the Executive Director of the National District Attorneys' Association, testified:

> "Q. Now, in this conversation in Washington with me [defendant], with reference to the complementary suite in Las Vegas, didn't you tell me that it was the policy of the Association [National District Attorneys' Association] to pay for the hotel lodging whether or not you slept on a park bench.
>
> A. You are entitled to it per diem, yes. " (168-169)

It is essential to note that no proof was presented by the Government that defendant himself received any of these monies. Nor did the Government attempt to disprove the existence of the informer. In this regard, the Government's contention, without any proof at all, was that Sam Houston might have been a collector of gambling debts. At no time was any gambling debt of Mr. Cahn demonstrated to have existed.

Further, nowhere is it claimed, nor is there any evidence, that defendant received expenses for trips that he did not take, or for services that he did not perform. The testimony is to the contrary in that defendant did, basically, what was expected of him. Nor is there any claim that Mr. Cahn received more than one payment for the same trip from the same entity--either the organization or Nassau County.

The aforesaid testimony together with more, will be developed in the argumentative portion of the brief and is not included herein because defendant does not wish to burden this Court.

The defendant was convicted on all counts.

At the sentencing the Court stated, among other things:

> "Another fact that I must consider here is that a sentence after trial is somewhat tentative because there is always a possibility of reversal at a new trial before another Judge. Any sentence that I impose puts a ceiling on what any other Judge can do if there is a third trial, another conviction, with different evidence." (1976).

THE ISSUES PRESENTED

1. Whether defendant's due process and double jeopardy rights have been violated by the superseding indictment which added 35 new counts after the first trial ended in a hung jury.

2. Whether the Government has failed to meet its burden of proof in connection with its false statement counts.

3. Whether any crime was set forth in the indictment or proven at trial.

4. Whether the Government has failed to sustain its burden of proof in connection with the mail fraud counts.

5. Whether the admission of testimony concerning the alleged similar acts was an abuse of discretion and unduly prejudicial.

6. Whether Judge Judd considered an improper factor in sentencing defendant.

POINT I

THE SUPERSEDING INDICTMENT SHOULD HAVE BEEN DISMISSED BECAUSE IT VIOLATES DEFENDANT'S RIGHT TO DUE PROCESS AND TO NOT BE PLACED IN DOUBLE JEOPARDY.

Building upon concepts set forth in North Carolina v. Pearce, 395 U.S. 711, the Supreme Court of the United States, in Blackledge v. Perry, 417 U.S. 22, held that a person convicted of a misdemeanor under state law who pursues his right of appeal must be able to do so without the apprehension that the state will retaliate by substituting a more serious charge for the original one, thus subjecting him to significantly increased potential punishment. In Blackledge a prison inmate was charged with and convicted of assault as a misdemeanor. He then exercised his right to appeal which, under North Carolina law gave Perry a trial de novo. After the filing of the appeal, but before the trial de novo, an indictment covering the same conduct for a felony offense of assault was returned. As set forth above, the Supreme Court held that the indictment on the felony charge violated defendant's due process rights because a person convicted of a misdemeanor has every right to pursue his state remedies without fear or aprehension that the government

will "up the ante". 417 U.S. at 28. The Court, in Blackledge, stated:

> "Due process of law requires that such a potential for vindictiveness must not enter into North Carolina's two tiered appellate process. We hold, therefore, that it was not constitutionally permissible for the State to respond to Perry's invocation of his statutory right to appeal by bringing a more serious charge against him prior to the trial de novo." 417 U.S. 28, 29, footnote omitted.

It is significant to note that in Blackledge there was no evidence that the prosecutor had acted in bad faith or had maliciously sought the felony indictment against Perry. 417 U.S. at 28. The Court emphasized that defendant should have been free to exercise his right to appeal without any fear or apprehension that the government will retaliate by substituting a more serious charge for the original one. 417 U.S. at 28.

Relying upon the teachings of Pearce, and Blackledge, the Court of Appeals for the Ninth Circuit held:

> "Pearce and Blackledge therefore establish, beyond doubt, that when the prosecution has occasion to reindict the accused because the accused has exercised some procedural right, the prosecution bears a heavy burden of proving that any increase in the severity of the alleged charges was not motivated by a vindictive motive. We do not question the prosecutor's authority to bring the felony charges in the first instance * * *, nor do we question the prosecutor's discretion in choosing which charges to bring against a particular defendant* * *. But when, as here, there is a significant possibility that such discretion may

> have been exercised with a vindictive motive or purpose, the reason for the increase in the gravity of the charges must be made to appear." U.S. v. Ruesga-Martinez, 534 F.2d 1367, 1369.

The Court in Ruesga-Martinez also stated:

> "The mere appearance of vindictiveness is enough to place the burden on the prosecution." 534 F.2d at 1369.

The Court reversed the judgments of conviction and ordered that the indictment be dismissed.

In United States v. Jamison, 505 F.2d 407, the Court of Appeals for the District of Columbia held that to re-indict defendant for first degree murder after the first trial on a charge of second degree murder had ended in a mistrial denied defendant due process of law in the absence of a showing of justification. The Court stated:

> "It would appear that the reasons for such increases, as well as the factual bases, must be made a part of the record at the time the higher indictment is filed with the court. As to what reasons might be sufficient to justify a sentence increase, one such reason was referred to in Blackledge, namely, that the more serious charge could not have been brought when the lesser crime were not at that time present, as the victim of that assault had not yet died, raising the possible charge to one of homicide* * *. A second situation, one which we do not think can be sensibly distinguished from the first, is that in which the government through no fault of its own simply does not learn until after the first indictment that the assault victim has died." 505 F.2d at 416.

The Court also stated that, because the record was barren of any reason why the first degree murder charge was brought

> "We can only conclude that the reindictment of appellants for first degree murder denied them due process and that their convictions of that charge cannot stand." 505 F.2d 417.

In Jamison, too, the judgment of conviction was reversed and it was ordered that indictments be dismissed.

In United States v. Johnson, 537 F.2d 1170, the Court of Appeals for the Fourth Circuit held that it violated the defendant's constitutional right to due process when he was charged with a 41 count indictment after his successful appeal which challenged a conviction, based upon a plea of guilty to one count of a four count indictment.

It is significant to note that the government in Johnson challenged the application of Blackledge and Jamison because in both cases the prosecutor at the time of the original indictment knew of the offense charged in the later indictment. In Johnson, the United States Attorney conceded that he was aware of the possible new charges at the time of the plea to the original indictment. 537 F.2d at 1173.

The Court disposed of the attempted distinction in Johnson by referring to the statements in Blackledge that the accused did not have to prove that he was an actual victim of retaliation. 537 F.2d at 1173.

See also, United States v. DiMarco, 401 F. Supp. 505 (U.S.D.C.C.D.Cal).

Prior to Blackledge, this Court held:

> "We have no quarrel with the proposition that prosecutorial vindictiveness can be no less than an affront to those values we characterize as 'due process' than judicial vindictiveness. Pearce would have application, if a prosecutor for no valid reason charged a defendant whose first conviction had been set aside, with a more serious offense based upon the same conduct." U.S. ex rel. Williams v. McMann, 436 F.2d 103, 105, cert. den. 402 U.S. 914.

Footnote No. 5 referenced in the above quotation reads:

> "'[The Pearce] principle must apply to all state officials, including the county attorney. Fear that the county attorney may vindictively increase the charge would act to unconstitutionally deter the exercise of the right of appeal or collateral attack as effectively as fear of a vindictive increase in sentence by the court'. Sefcheck v. Brewer, 301 F. Supp. 793, 795 (S.D. Iowa 1969), 436 F.2d at 105, Fn. 5.

Therefore, this Court, prior to the decision set forth above has recognized the due process violation which inheres

in a vindictive increase in the charges by the prosecutor.

In sum, it is clear that the consitutional rule which emerges from a reading of all of the above cases is that the prosecution, after a trial, may not "up the ante" by superseding the original indictment so as to include additional charges against the defendant, especially when the facts constituting the later charges are known to it at the time of the original indictment.

In the case at bar, the original indictment (75 CR 645) charged a total of 11 counts, (8 mail fraud [18 U.S.C. 1341], 1 false statement [18 U.S.C. 1001], 2 perjury [18 U.S.C. 1623]) (11a28a), whereas the superseding indictment (75 CR 645 [S]) charges a total of 46 counts (10 false statement, 36 mail fraud [30a-41a]). Prior to the first trial, the perjury counts had been severed.

In addition to adding the extra counts on the second indictment, the Government concedes that the "facts" which were before the Grand Jury and which culminated in the superseding indictment all were before the same Grand Jury in connection with the original indictment. (1962). That Grand Jury, for one reason or another, chose not to indict the defendant except for the eleven counts

set forth in the original indictment. After the mistrial because the trial jury could not agree upon a verdict with respect to the first indictment, and after the defendant had initiated a civil action against the U.S. Attorney for the Eastern District and against the Assistant U.S. Attorney involved in the trial and pursuant to 42 U.S.C. 1983 (76 Civ. 512) the "ante was upped" by 35 counts when the superseding indictment was returned.

It is clear that defendant has been prejudiced; increased expenses, inability to retain trial counsel, increased public scorn and embarrassment and exposure to increased penalties. Further the inclusion of Count 46 in the superseding indictment was the predicate for introducing evidence of other similar acts, which as will be developed in Point V, infra, was highly prejudicial to defendant. Further, Mr. Cahn actually received an increased penalty in that on Count 46 which was not charged in the original indictment he received two years of unsupervised probation (1976).

By motion dated April 8, 1976, defendant moved to dismiss the superseding indictment on the grounds that his Fifth Amendment rights were being violated and on

the ground that his double jeopardy rights were being violated. After the trial the defendant moved to set aside the verdict on the specific ground of Blackledge and its progeny. This motion was opposed orally by the Assistant United States Attorney and was denied, Judge Judd referring to his not being bound by the Jamison decision, because it was not a Second Circuit decision.

Based on the prior history of this matter, the question must arise: if defendant is successful on this appeal and if this issue is not reached by the Court, will another indictment charging crimes not charged in the superseding indictment be returned?

In addition to his due process claim set forth above, defendant presses the argument that the government's actions have violated his rights under the double jeopardy clause of the Fifth Amendment as set forth in U.S. v. Dinitz, 424 U.S. ___, 96 S. Ct. 1075, and U.S. v. Jorn, 400 U.S. 470.

In view of all the above, it is submitted that defendant's rights under the due process and double jeopardy clauses have been violated, defendant has been prejudiced by the violation and the government cannot justify its actions. Accordingly, the conviction should be reversed and the

case remanded to the District Court with instructions to dismiss the superseding indictment.

POINT II

THE GOVERNMENT HAS FAILED TO SUSTAIN ITS BURDEN OF PROOF IN CONNECTION WITH FALSE STATEMENT COUNTS.

18 U.S.C. 1001 provides:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies and shields or covers up by any trick, scheme, or devise, a material fact, or makes any false, fictitous or fraudulent statement or representations or makes or uses any false writing or document knowing the same to contain any false, fictitous or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

In United States v. Marchisio, 344 F.2d 653, 666, this Court held that the four elements which constitute an offense under Section 1001 are:

1. A statement,
2. Falsity,
3. Statement was made knowingly and willfully, and
4. False statement is made in connection with a matter within the jurisdiction of any department or agency of the United States.

The superseding indictment charges (Counts 1-10) that the National District Attorneys' Association, the National Center for Prosecution Management, the National Police Task Force, the Arizona County Attorneys' Association, and the

National Center for Prosecution Management reimbursed Mr. Cahn with funds which it had received from Law Enforcement Assistance Administration (LEAA).

It is significant to note that the indictment does not allege that the funds of this organization which actually paid Mr. Cahn were funds of an agency or department of the United States Government. At the trial it was developed that none of these entities which reimbursed Mr. Cahn are, in fact, agencies or departments of the United States Government. Although they do receive some Federal funding, these entities are all non-governmental entities (116, 131, 369, 360, 452, 527).

In Lowe v. U.S., 141 F.2d 1005, the Fifth Circuit Court of Appeals held that an employee who falsified an employer's payroll at a time that the employer was building ships for the United States Maritime Commission under a contract providing that the employer should be reimbursed for payroll payments by the United States Treasury could not be convicted for making a false statement as to "matter within the jurisdiction of a department or agency of the United States." The Court stated that the hours of work and rate of pay, as well as the control and supervision over the employee, were matters within the exclusive dominion of the private employer and that the misrepresentation as to the hours worked was

made to an employee of the private corporation under an arrangement whereby the wages which were to be paid by the corporation were to be reimbursed by the United States Treasury. The Court went on to state that insofar as the employee was concerned all aspects of his employment were exactly the same as if his employer did not have any contract whatsoever with a governmental agency, and that his employer's method of procuring payment under the contract did not change his relationship to his employee. In addition, the contract itself did not designate the payroll department as an agency of the United States, nor did it place that department under the control or supervision of any such agency. The matter was remanded to the District Court for the dismissal of the indictment.

In Terry v. United States, 131 F.2d 40, Eighth Circuit Court of Appeals, in a case where an application for credit was made on Federal Housing Administration forms which contained nothing to indicate that the financial institution to which the application was addressed was an agency of the United States held:

> "We are of the opinion that on the charge and the proof in this case it would be contrary to the legislative intent to sustain this conviction. It is clear that the Housing Administration had no cognizance of the Williams Loan transaction on which the indictment rests at the time of the commission of the acts charged against defendant in respect to that transaction. Whether the Administra-

tion would or would not obtain such cognizance depended entirely upon the free will of other parties over whom defendant had no control, and it is contrary to elemental principles of the criminal law that an act which is not criminal at the time of its commission be converted into a crime at a subsequent time by the independent action of other persons." (131 F.2d at 44).

In U.S. v. Adler, 380 F.2d 917, this Court held:

> "Consistent, therefore, with the view that Sec. 1001 was broadly drawn to protect the 'authorized functions' of federal agencies from 'perversion', the word 'jurisdiction' as used in the statute must mean simply the power to act on information when it is received." 380 F.2d at 922.

Further, Judge Dooling held on a motion to dismiss the false statement count of the original indictment:

> "The more serious question is whether Count 7 is sufficient in alleging an offense under Section 1001. Reference is made to 42 U.S.C. 3701-3795, which codifies the part of the Omnibus Crime Control and Safe Streets Act of 1968 which dealt with the Law Enforcement Assistance and Criminal Justice parts of the Act. Sections 3791 and 3792 deal with embezzlement and related wrongs affecting LEAA funds (3791) and the knowing and willful falsification, concealment or covering up by trick, scheme or device of any material fact in 'any application for assistance submitted pursuant to' the chapter (3792). It will be seen that the language of Section 3792 just paraphrased is identical with the first part of the language of Section 1001 which reads
>
> > 'Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or

> device a material fact, ... shall be fined ... or imprisoned ... or both.'

Nothing, however, in Section 3792 goes on to pick up the remaining language of Section 1001 which is the following:

> '... or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined ... or imprisoned ... or both.'

However, the Count as drafted is drafted under this latter quoted language of Section 1001 and not under that language of Section 3792 which is present also in Section 1001. It must be concluded from this that the Court is bad if it requires underpinning from Section 3792, for if that section is relied upon at all, it would appear that the charging language of the Count must express an offense within the language of Section 3792 rather than simply within the language of Section 1001. Whatever the reason for the particular language chosen and the particular approach taken in Sections 3792 and 3792, it seems clear that the LEAA offense, if intended to be singled out, must be charged in the language of Section 3792.

Whether Count 7 can be saved as a Count directly under Section 1001 was not really argued. The Government's brief simply assumed that it was enough that the National Center for Prosecution Management was an LEAA funded organization. But an entity hardly becomes an agency or department of the United States because it is funded under such an LEAA program, and, in the light of only authority so far seen, it must be concluded that the Count is not sufficient under Section 1001 standing alone.

Nor does it appear that the facts alleged could support a Section 3792 case. That section is limited to false material used in connection with an 'application for assistance submitted

> pursuant to' the Law Enforcement Assistance Chapter of Title 42. A claim for reimbursement of travel expenses made to an LEAA assisted entity, or in connection with an assisted program, would not be within the statute."

In the case at bar, based upon the above, it is submitted that there is a complete failure of proof by the Government that the situation is one within the jurisdiction of any department or agency of the United States as required by 18 U.S.C. 1001 as interpreted above. In other words, the non-governmental organization had a finite sum of money some of which was Federal money, and the claim of the defendant for reimbursement of his expenses was transmitted to the non-governmental entity which reimbursed him with that entity's funds, the entity never obtaining permission or consent of the Federal agency to make payment, and the agency never even seeing the claim.

Therefore, the Government has not proven one of the essential elements of the crime charged, i.e., that the statement was made in connection with a matter within the jurisdiction of an agency or department of the United States. Moreover, the indictment itself is defective for the same reason. Accordingly, counts 1 through 10 of the superseding indictment should be dismissed.

Further, there is a complete failure of proof with respect to the elements of knowing and willful falsification of any documents. To the contrary, it is clear that Mr. Cahn specifically intended the association involved (not Nassau County) to bear the cost of the trip. Nassau County simply loaned the money to Mr. Cahn through the Prosecution Fund and this loan was repaid by Mr. Cahn's payment to Houston, a recognized County obligation. This is underscored by the defense which was strenuously urged at the trial that Mr. Cahn had approximately 38 meetings with Houston, all of which involving payments were witnessed by individuals who signed affidavits to that effect, sworn around the time of the meeting (2011-2041). These witnesses also testified at the trial itself (647 et seq., 693 et seq.). Further, defendant's Exhibit L demonstrates a long and protracted relationship with this informer, some of the information imparted, and the amounts which were paid to him (2070-2080).

In brief, the defendant did the following in order to keep his word to the informer and in order to obtain the critical information which he believed that this informer was able and capable of giving to him. As he was permitted to do, he took an advance for a trip on which he was going to conduct County business sn well as organization business.

This advance was taken from the Prosecution Fund which he maintained in his office as District Attorney of Nassau County. Afterwards, he then would go on the trip, perform the County business and also perform organization business. Upon his return he would fill out the claim form prepared by the organization or submit a letter and submit it to the organization for reimbursement. His claim would be paid and he would receive cash which he would then repay to the County by placing it in the Sam Houston envelope over which he retained control, and which was located in a locked closet in his office. Whenever he met the informer and paid him any monies, these monies came from this envelope and they consitute a legitimate County expense. In addition, a composite photograph of Sam Houston was drawn and he was identified by Spahr and Spinatto, who testified at the trial and who witnessed the payments and who executed affidavits on or about the time that these payments were made by the defendant (654, 696, 2042).

There is no proof that defendant himself retained any of these monies and there is no proof that the informer was not actually paid these monies. In fact, as to Counts 1, 2, 3 the County was repaid the monies directly by Mr. Cahn (Deft's Ex. a, 2070, 336).

The jury had before it the direct testimony of the defendant in which he categorically denies any intent to willfully or in any other manner file false claims, as well as the direct evidence of the witnesses to the payments to Houston (647 et. seq, 693 et seq.).

Mr. Cahn, a respected and dedicated District Attorney, has marshalled a very impressive array of character witnesses, all of whom testified to his reputation for truth and honesty in the community. Such character testimony, it is submitted, creates a reasonable doubt, as a matter of law, under the circumstances of this case, even if the Court does not agree with appellant's argument relative to the construction of Section 1001. See, Michelson v. U.S., 335 U.S. 469, 476; Edgington v. U.S., 164 U.S. 361, 367; Weedin v. U.S., 380 F.2d 657 (9th Cir.); U.S. v. Wooden, 420 F.2d 251 (D.C. Cir). It is submitted that based upon this character testimony, together with the testimony of defendant himself denying the intent and willful falsification of statements that this indictment counts 1 through 10 must be dismissed in all respects because the Government has not proven a willful and knowing falsification of records.

The defendant's good faith, in connection with this matter is amply demonstrated by his inquiry of Comptroller

Angelo Roncallo (605-608) and the present Comptroller, Mr. Christ, who stated in answer to questions of the defendant:

> "Q. Is it a proper County procedure, is it not, and a proper County experience for the District Attorney to draw a check on the Prosecution Fund for an intended trip in reference to county business, is it not?
>
> A. We have allowed that. It represents an advance that we don't like to pay, but we have allowed it." (68).

In sum, it is submitted that no false statements were made, and no facts were concealed. Mr. Cahn was attempting as best he could to serve the People of Nassau County as District Attorney.

Defendant recognizes the rule in this Circuit that the Government need not prove materiality of the statement involved under Section 1001. It is submitted that this Court should review its position in connection with this element of the crime and overrule those holdings which are to the effect that materiality is not an essential element of a crime under Section 1001. In this regard the defendant points to those cases in other Circuits which are recited in this Court's opinion in United States v. Marchisio, supra, at p. 66 Fn 9. A request to charge in this regard was made (1904).

For all the reasons set forth above, the Government has

not proven its case beyond a reasonable doubt. The conviction of charges 1 through 10 should be reversed and the indictment insofar as those charges are concerned should be dismissed in all respects.

POINT III

BECAUSE RECEIVING DUAL REIMBURSEMENT FOR THE SAME EXPENSE FROM DIFFERENT ENTITIES IS NOT CRIMINAL THE MAIL FRAUD COUNTS SHOULD BE DISMISSED

It seems that the government contends that it is a criminal act to claim expenses from private entities while concurrently claiming those same expenses from Nassau County in connection with trips during which the defendant performed distinct services for the County and for those other entities. In other words, is it a criminal act to claim reimbursement of the same expenses which are actually incurred from two entities each of which independently is obligated to reimburse travel expenses?

Since there is no federal common law of crimes (See, Jerome v. United States, 318 U.S. 101), in order for conduct to be considered a crime, there must be a specific federal statute proscribing specific conduct and imposing a punishment. Vierick v. United States, 318 U.S. 236. It is submitted that it is not for the courts to make an act a crime "which is not within both the letter and spirit of a penal statute." United States v. Fisher, 456 F.2d 1143, 1145 (10th Cir.).

Not only is receiving two payments from two entities for a single expense not a crime, but an individual may invoke the aid of the courts to recover payments from each. For example, where one has coverage under two insurance policies, he may recover his expenses from both companies, unless it is expressly and unambiguously stated that expenses will not be reimbursed under such circumstances. See, Pubin v. Empire Mutual Insurance Company, 25 NY2d 426, 306 NYS2d 914; Thomas v. Universal Life Insurance Co., 201 So.2d 529 (3rd Cir.Ct.App.La.); Sykes v. Nationwide Mutual Insurance Co. v. Schilansky, 176 A.2d 786 (Mun.Ct.App.D.C. 1961). The law does not prevent the double reimbursement of expenses.

Even where the expenses were not actually paid by the civil claimant, the courts have enforced obligations to pay. See Crosson v. N.V. Stoonvart Mij "Nederland", 409 F.2d 865 (2d Cir.), in which a stevedore was held liable for counsel fees to a shipowner, despite the fact that the shipowner's insurance company defended the action at no cost to the shipowner. See also, Spurr v. La Salle Construction Co., 385 F.2d 322 (7th Cir.). In North Central Airlines,Inc., v. City of Aberdeen, S.D.,

370 F.2d 129, 134 (8th Cir.), the court held that a tenant which had agreed to pay the landlord's expenses, was not affected by the fact that the landlord had insurance to cover its expenses.

This is not a civil case in which Mr. Cahn is seeking to declare his rights to payment from the private entities involved. Nor is this case a civil case in which those private entities are seeking return of payments made.

Accordingly, because the indictment does not charge a crime it should be dismissed.

However, if the dual reimbursement of Mr. Cahn were criminal, it is submitted that in order to properly charge a crime, additional explicit allegations are required, e.g., actual knowledge and specific intent (See Point IV, infra). Such "necessary allegations cannot be left to inference." Williams v. United States, 265 F.2d 214, 218 (9th Cir.).

Because this essential element is absent from the indictment (33a-39a) the thirty-six mail fraud counts should be dismissed on the face of the indictment.

Further, it is submitted that no proof was adduced at trial which would make dual reimbursement for conceded expenses illegal. (See Point IV, infra.)

It must be noted in connection with the above that at no time was it ever contended by the Government that the same entity was charged twice for the same expense.

In this regard, in his charge, Judge Judd said:

> "Filing duplicate claims for one expense without disclosing the facts to one or both of the persons to whom the claims are presented can in and of itself be fraudulent. It requires no explicit guideline, by-law, regul tion, statute or policy formulation to make it so. Indeed, it is more to the point to say that no guideline, by-law, regulation, statute or policy formulation explicitly authorized dual payment for a single expense.
>
> It follows that ignorance of the existence of a by-law or policy on the point where one existed or had been articulated would not of itself excuse one who filed dual claims for reimbursement.
>
> Nevertheless, you must bear in mind the very important third essential element of each of these counts. That essential element requires that the Government show beyond a reasonable doubt that the defendant believed that the Association in question might not have allowed the claim for reimbursement if it had known that a second claim for reimbursement of the same expense was being presented at the same time." (1864-1865).

It is submitted that the foregoing excerpt from the charge is reversible error because it recognizes

that dual reimbursement may not be illegal and then it seems to unconstitutionally place upon the defendant the burden of disproving the possibility of criminality. Further, to state that an act may be criminal even though it violates no statute, guidelines, by-law, or policy formulation is error. See Jerome v. United States, supra.

Also, to predicate a criminal act on what a defendant believed "might" have happened, rather than on what he actually knew would have happened is error. To declare a legal act felonious, only because of accused's belief, in the absence of any prohibition, whether public or private, being in any way communicated or chargeable to the accused violates due process.

In sum, there is no statute or regulation that prohibits dual billing; the indictment does not charge a crime on the mail fraud counts; and the proof at the trial falls far short of proving a crime on the mail fraud counts.

Accordingly, the judgment of conviction on the mail fraud counts should be reversed and the counts dismissed.

POINT IV

THE GOVERNMENT HAS FAILED TO PROVE ANY OF THE MAIL FRAUD CHARGES BEYOND A REASONABLE DOUBT

18 U.S.C. 1341 in pertinent part provides:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud or for obtaining money or property my means of false or fraudulent pretenses, representations, or promises * * * for the purpose of executing a scheme or artifice or attempting to do so * * * knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any [matter or thing whatever to be sent or delivered by the Postal Service] shall be fined not more than $1,000 or imprisoned not more than 5 years, or both."

In United States v. Baren, 305 F.2d 527, this Court stated that every mail fraud case must contain the following elements: a scheme to defraud, representations known to be false, and some person defrauded. Further, it is well settled that in addition to the scheme to defraud the statute requires a specific intent on the part oof the defendant to commit a fraud. U.S. v Klein, 515 F.2d 751 (3rd Cir.); U.S. v. Nance, 502 F.2d 615 (8th Cir.); U.S. v. Bryza, 522 F.2d 414 (7th Cir.).

In Bryza the Court addressed itself to the question of intent by stating:

> "Mail fraud, like all other crimes arising out of deceit or deception requires a specific criminal intent. The burden is on the government to establish beyond a reasonable doubt that the defendant not only knowingly performed acts which the law forbids, but that he did the acts with intent to violate the law." 522 F.2d at 414.

In U.S. v. Regent Office Supply, Co., 421 F.2d 1174, this Court stated:

> "It is generally stated that there are two elements to the offense of mail fraud: use of the mails and a scheme to defraud. Since only a 'scheme to defraud' and not actual fraud is required for conviction we have said that it is not essential that the government allege or prove that purchasers were, in fact, defrauded * * * but this does not mean that the government can escape the burden of showing that some actual harm or injury was contemplated by the schemer. Proof that someone was actually de-frauded is unnecessary simply because the critical element in a 'scheme to defraud' is 'fraudulent intent' * * * and therefore the accused need not have succeeded in his scheme to be guilty of the crime. * * * but the purpose of the scheme must be to injure, which doubtless may be inferred when the scheme has such effect as a necessary result of carrying it out * * * Of course proof that someone was actually victimized by the fraud is good evidence of the schemer's intent." 421 F.2d 1180, 1181. Emphasis in original.

Ordinarily, in a mail fraud case, good faith of defendant is a complete defense. Coleman v. U.S., 167 F.2d 837 (5th Cir.); Steiger v. U.S., 373 F.2d 133 (10th Cir.).

It is submitted that the proof, as a matter of law, mandates a finding that Mr. Cahn did not have a specific intent to defraud any entity and acted in absolute good faith when he embarked upon his plan to pay Houston:

1. He consulted with Angelo Roncallo, the then Comptroller of Nassau County (605). Roncallo testified:

> "Q. Would you tell the Court and jury, if you will, what the subject matter of that conversation was and what I said to you and what you said to me, to the best of your recollection?
>
> A. When I arrived at your office, you indicated that you were concerned about the confidentiality of an informant. We had a fund out of which informants are paid. But you did not want to send the claims through that fund because of your concern about the confidentiality. And you asked me if there was another way to process the claims or if you could circumvent, I guess, the usual process that we used at that time." (605-606)

2. Halested Christ, the County Comptroller following Mr. Roncallo testified:

> "Q. I withdraw the form of the last question, your Honor, and I will ask Mr. Christ, you did conduct, your office did conduct an investigation into this so-called dual billings?
>
> A. Yes, we did.

Q. And did you not come to the following opinion:

'As discussed above, Mr. Cahn has acknowledged that he has made claim to and received payment from both Nassau County and other entities for the same expenses and our examination confirms this in several cases. From the information provided us we are of the opinion that payments of this nature made to an informant are proper county charges and that if they were to be submitted to this office in the customary manner would be approved by us for payment. This office does not concur, however, that deviations from the prescribed claims audit procedure are acceptable.'

Was that not your opinion?

A. That is right." (86).

3. He researched the County Law, the County Charter and State Law generally to determine whether there would be a violation (759).

4. He kept affidavits as to the meetings and payment (760, 2044-2069).

5. All meetings at which payments were made to Houston were witnessed by either Spahr or Spinatto who also executed affidavits (648-649, 2034-2041; 693-694, 2011-2033).

6. He kept an account of all activities with Houston, including information received and payments made (2070-2080).

7. Over twenty character witnesses from all walks of life testified to Mr. Cahn's reputation for honesty and truthfulness.

Based upon the above and upon all of Mr. Cahn's testimony, it is submitted that not only did Mr. Cahn not receive two payments for a single expense but he was in the purest of good faith and did not intend to violate any law. This method of payment is another novel method of crime fighting by Mr. Cahn.

Further, the Government has not shown that Mr. Cahn in any way contemplated that any entity should be harmed. The following witness testified:

1. Patrick Healy, Executive Director of the NDAA, testified that on some occasions he knew that Mr. Cahn was also traveling on County business but he never inquired whether he was receiving payment from the County (166-167).

2. Dennis Debrowski, Chief of Financial Management Division of LEAA, testified that the regulation governing reimbursement of expenses does not specifically state that dual reimbursement is not permitted (253, 274, 275. He also testified:

"Q. If an individual is invited to speak in San Francisco at a function by an organization receiving funds from LEAA and he submits a voucher to a friend of his, John Jones, stating that the air fare to San Francisco is so and so, is $400, and I expect to pay in expenses of hotel bill and meals another $100, will you lend me $500; and the $500 is forthcoming, based upon that letter from the individual invited, he gets $500 from John Jones, but there is in existence a letter which indicates what that money is going to be used for, and after performing his services for the organization which invited him to San Francisco, he receives a check out of LEAA funds for the expenses, totalling $500, after submitting a bill to that organization for expenses of $500--

THE COURT: Isn't that the same question you asked before and the witness has answered?

MR. CAHN: I didn't get an answer, your Honor.

THE COURT: I heard him answer. Go ahead.

Q. (continuing) The individual takes the checks from that organization and repays it to his friend from whom he borrowed it, would you interpret that as dual reimbursement?

A. I don't think that would be dual reimbursement, the way you described it, if I understood it correctly." (283-284).

3. Ron Briggs, the Director of Training for the Louisiana District Attorney's office testified similarly on the question of repayment of borrowed expense money (371-372).

4. Robert Fertilla, Associate Dean of the National

College of District Attorneys testified that he personally as distinguished from the Board of Regents, had an oral policy against dual reimbursement during the period in question (459) and that he was not aware of any LEAA regulations forbidding dual reimbursement but, if he had known of the issue, he would have asked LEAA for an opinion (461, 471). He also testified that if the moneys had been loaned to Mr. Cahn for the trip, his organization would have reimbursed Mr. Cahn and it did not constitute dual reimbursement (484).

5. Vernon Hoy, who had been involved with the National Police Task Force, testified that his organization paid a per diem and air fare (527, 530, 541). In addition, he stated that the Task Force was entirely funded by LEAA money (532).

Based upon all the above, and upon the testimoney set forth in Point II, supra, it is clear that, as a matter of law, there was no scheme to defraud any of them and that at no time did Mr. Cahn intend to commit a fraud. Further, Mr. Cahn's good faith in connection with the transactions is clear. (See testimony described in Point II, supra.)

Accordingly, the convictions on mail fraud counts should be reversed and the indictment dismissed because, as a matter of law, the Government has not proved its case.

POINT V

THE ADMISSION OF TESTIMONY CONCERNING DEFENDANT'S "PRIOR SIMILAR ACTS" WAS AN ABUSIVE DISCRETION AND UNDULY PREJUDICIAL.

In U.S. v. Dwyer, ___ F.2d ___, decided July 26, 1976, this Court stated:

> "Rule 403 of the Federal Rules of Evidence permits a trial judge to exclude relevent evidence ' if its probative value is substantially outweighted by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cummulative evidence.' In the balancing of probative value against unfair prejudice required by Rule 403, the trial judge has wide discretion * * * and that ruling he makes will not be disturbed unless such discretion has been clearly abused." Slip Opin. p. 5096.

Further, this Court held in U.S. v. Viruet, __ F.2d ___, decided August 5, 1976:

> "The admission of testimony concerning Viruet's participation in other transactions involving stolen goods was proper and was not unduly prejudicial * * *. There was a sufficient parallel between the acts charged in the indictment and the prior (and subsequent) acts shown by the testi-mony so that it had real probative value regarding appellant's willingness and intent to enter into the proven conspiracy rather than merely suggesting that the appellant was of poor character." Slip Opin, p. 5151.

In the case at bar, it is submitted that it was reversible error to admit testimony of purportedly similar acts with respect to Mr. Cahn's alleged claim for monies from only Nassau County for expenses allegedly not actually incurred.

The entire indictment generally charges Mr. Cahn with receiving two payments for actually incurred expenses allegedly resulting in a fraud only upon a private entity, i.e., dual billing. The purported similar acts deal only with single payments by the County for expenses allegedly not incurred--the Hawaii trip, the London trip, the San Juan trip (300-309).

Judge Judd admitted such testimony on the theory that it was relevant to a part of Count 46, a count not contained in the original indictment (309, 357). On the first trial, Judge Dooling excluded the same evidence as not relevant to the charges of dual payments.

Essentially, the so-called similar acts involved trips to London, Hawaii and San Juan. The predicate for admitting testimony of these trips is that portion of Count 46 which relates to an alleged payment of $1[illegible]

by NDAA to Mr. Cahn for expenses which he did not actually incur (40-a, 300-309). However, Mr. Healy of the NDAA testified that Mr. Cahn was entitled to that money as a per diem (168-169). Thus, even this basis for admitting the evidence proved lacking in foundation.

The admission of this testimony in which Mr. Cahn is depicted as allegedly falsifying expenses is highly prejudicial because of the overriding aspect of Mr. Cahn's integrity and credibility in the trial. In each instance he was forced to defend himself against accusations of dishonesty for which he had never been indicted. Both to introduce evidence of such acts and to defend them required voluminous testimony. Six of the Government's nineteen witnesses testified almost exclusively about thes three expense payments totally outside the forty-six count indictment. Additionally, Mr. Cahn testified extensively about these payments and two other defense witnesses were brought into this County solely to give evidence about these matters.

Based upon the above decisions, the admission of this testimony was prejudicial error.

Coupling the prejudicial admission of the above evidence with the trial judge's erroneous statement in

the charge:

> "And you may consider that he [Mr. Cahn] has perhaps more of a motive to slant the testimony and even to lie than any other witness in the case" (1873),

it is submitted that Mr. Cahn's credibility and integrity may have suffered a fatal blow in the eyes of the jury. Under the circumstances of this case, where credibility was made a critical issue, the conviction should be reversed.

POINT VI

THE TRIAL JUDGE CONSIDERED AN IMPERMISSIBLE ELEMENT IN SENTENCING DEFENDANT.

At the sentence, Judge Judd stated:

> "Another fact that I must consider here is that a sentence after trial is somewhat tentative because there is always a possibility of reversal and a new trial before another judge. Any sentence that I impose puts a ceiling on what any other judge can do if there is a third trial and another conviction, which different evidence." (1976).

It is submitted that the above is error in that it is totally improper to give any weight to the extent that another judge may be bound in the event of a retrial.

Accordingly, if the conviction is sustained, this Court should remand the matter to the District Court for resentence. See, Woosley v. U.S., 478 F.2d 139 (8th Cir.).

CONCLUSION

FOR ALL THE REASONS SET FORTH ABOVE THE JUDGMENT OF CONVICTION ON THE SUPERSEDING INDICTMENT SHOULD BE REVERSED AND THE SUPERSEDING INDICTMENT DISMISSED IN ALL RESPECTS.

Respectfully submitted,

FARRELL, FRITZ, CAEMMERER & CLEARY, P.C.
Attorneys for Defendant
374 Hillside Avenue
Williston Park, N.Y. 11596
(516) 741-1111

By _____
John M. Armentano

Of Counsel:

John M. Armentano

The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES

VS

WILLIAM CAHN

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NY , ss:

BERNARD S. GREENBERG being duly sworn,

deposes and says that he is over the age of 21 years and resides at 162 E. 7th St NY, NY

That on the 1st day of October, 1973 19 at

he served the annexed appendix; appellant's brief and exhibit volume upon David Trager, U.S. Attorney, 225 Cadman Plaza, Brooklyn, NY 11201 in this action, by delivering to and leaving with said attorneys two copies of the brief and appendix and one of the exhibit volume true cop thereof.

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the person mentioned and described in the said

Deponent is not a party to the action.

Sworn to before me, this 1st day of October, 1973 19

Bernard S Greenberg

Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1975